

South East Timber Association to the NSW Environment Protection Authority (EPA) Draft Regulatory Strategy

Introduction

South East Timber Association (SETA) members advocate for policies that allow for appropriate active and adaptive management of native forests and other native vegetation on both private and public land. SETA expects government policies and practices will maintain environmental values in the long term.

A number of SETA members have extensive experience in the management of native vegetation landscapes, particularly native forests. SETA members were involved in the public engagement and submission phases of the Coastal IFOA. This submission draws on that experience and observations of the various facets of operation of EPA staff in relation to regulation of native forest operations on public and private land.

If the EPA is genuinely committed to becoming a world class regulator, staff must have values and skills which are strongly aligned to the NSW public service and the EPA's espoused core values. SETA members experiences over the past four years provides a strong indicator that some senior and other staff have personal value sets that do not align with the government sector core values set out in Section 7 of the *Government Sector Employment Act 2013 (GSE Act 2013)* and the *EPA Code of Ethics and Conduct 2015*.

A number of examples will be provided as part of this submission to give senior EPA staff some guidance on the extent of divergence from stated core values.

EPA Draft Regulatory Strategy

SETA comments on the strategy will generally focus on the approach the NSW EPA has taken in relation to development of and enforcement of the rules relating to the use of public and private native forest for timber production.

1. Outcomes Focus

"This means we focus on the impact of what we, industry and the community do, rather than just on setting and following rules."

Based on participation in consultation sessions and content of the final Coastal Integrated Forest Operations Approval (Coastal IFOA) Protocols and Conditions, SETA members were disappointed that the process was generally focussed on tape measure compliance metrics, rather than improved environmental outcomes.

EPA staff appeared to have little understanding of the principles of active and adaptive management and assumed that exclusion of all forms of disturbance from non-harvest areas, through a "permanent protection" mantra would deliver sustainable native forest environmental outcomes.

"We aim to assess the greatest risks and address the biggest impacts to human health and the environment."

It was clear from the tape measure metrics focus, that the EPA was seeking a simple penalty system, that was easy for staff, with little or no forest ecology or operations knowledge to



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issue penalties. The system appears to be set up to issue financial penalties, whether or not "breaches" resulted in any environmental harm. For example:

On 27 April 2020, the EPA issued a press release announcing that the Forestry Corporation of NSW (FCNSW), *"was fined \$15,000 for not marking an adequate number of trees for retention in Tantawangalo State Forest."*

[https://www.epa.nsw.gov.au/news/media-releases/2020/epamedia200427-forestry-corporation-fined-\\$31100-after-epa-investigation](https://www.epa.nsw.gov.au/news/media-releases/2020/epamedia200427-forestry-corporation-fined-$31100-after-epa-investigation)

The key issue from an environmental outcome perspective, which was not addressed in the press release, was that all necessary trees had been retained and were still standing in the forest. The only thing missing was some paint markings.

This is just one of a number of examples where some staff have just chosen to just follow the rules. The EPA chose to issue a \$15,000 fine, because the tape measure rule book allows them to.

"We influence significant land use planning decisions to advocate for better environmental outcomes."

Advice received from other agency staff involved in negotiations with EPA staff suggest that what the EPA considers to be *"advocating for better environmental outcomes"* is seen to be bullying in nature and a steadfast refusal to consider alternative courses of action (adaptive management), that potentially deliver sustainable environmental outcomes, while having less negative impacts on social and economic outcomes.

Are these the types of behaviours that make a world class regulator?

Recommendation 1

It is recommended that oversight of development of future native forest legislation, regulation and codes or environmental operations manuals be undertaken by an agency that has staff with high level understanding of native forest ecological processes and an understanding of active and adaptive management principles.

Recommendation 2

It is recommended that the NSW Government transfer responsibility for regulation and enforcement of all native forest harvesting on public and private land to another agency, such as the Department of Primary Industries.

2. Service Oriented

"Bringing community, government, industry and other stakeholders together to solve problems, responding in a timely manner to requests, queries and incidents, and communicating clearly and respectfully with meaningful content."

SETA members experience is that key stakeholders working in the forests have not been "brought together" in an ongoing way.

For example, following a morning field inspection, an authorised officer identified 22 alleged non-compliances with the then licence conditions, with 16 readily fixable. In the afternoon, rather than take the matter up with the contractor, the officer chose to meet with local activists who were campaigning against the harvest operation.



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The first the contractor knew there were any issues was when an Official Caution arrived six weeks after the inspection. There were no make good orders, but the contractor fixed the alleged non-compliances. Some could not be fixed as a field inspection found four (later confirmed to be five) were alleged offences were fabricated. Another 11 had been exaggerated by the misuse of licence non-compliance terms.

Nine months after the initial inspection, the caution was officially withdrawn. Despite the questionable behaviour of the authorised officer, the EPA then chose to issue a Warning Letter. The EPA staff member appeared to escape any sanction and was promoted to a senior position in the government independent water regulator.

Were these actions outcome focused or service oriented? Are these the types of behaviour that makes a world class regulator and demonstrate adherence to the Core Values set out in the *EPA Code of Ethics and Conduct*?

3. A learning Mindset

"Continuously developing and building expertise to improve how we regulate and tackle environmental and human health problems."

An organization that seeks to establish a learning mindset must have a predominance of staff who are able to look at issues from multiple perspectives. SETA experience suggests that too many EPA staff in forest regulatory rolls seem to have insufficient training to fully understand the limits of their powers. Others appear to be pursuing eco-political agendas and have values more in line with an activist organisation than those espoused by the EPA.

In 2016, the EPA released a draft report titled *Sources of suspended sediment in the Wonboyn River catchment*, relating a flood even in south east NSW. The flood affect was of great interest to oyster growers with leases in the Wonboyn Lake. Two days before a public meeting to discuss the report, the author wrote to the EPA and stated among other things:

"After a drive around the area that I thought was an issue, this weekend, I discovered the geology mapping was wrong. Which means the soil mapping is correct.

I openly admit that I did not consider stream bank erosion sufficiently.

So I am happy for my report to be scrapped as the crux of my concern (an area recently logged) that I thought was the nasty red subsoil, is not. It is granite."

Two days later at a public meeting, the report was discredited on a number of technical and other factual grounds. The author and an EPA staff member committed to rewrite the report. During the course of the meeting a local property owner identified the source of the unusual coloration and explained why this issue had been a one-off event.

Follow-up emails and photos of the source material were sent to the EPA by the resident. The EPA committed to come down in the following month to take their own samples and further investigate the issue.

Two EPA forestry staff later reviewed the report. Their report was six and a half pages of detailed fault finding. Just a few of their general comments are provided below.



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"Given that it is a stand-alone OEH report that critiques the longstanding, widely accepted and EPA endorsed inherent soil erosion and water pollution hazard assessment module, it is not appropriate for it to carry an EPA title or EPA badging.

*There is no evidence to suggest that the sediment plume in the Wonboyn River catchment came from State forest. The report has not identified areas of rill or gully erosion, sediment movement from roads or crossing failure on State Forest yet the author concludes that "the majority of the suspended sediment was sourced from the road and track network associated with forestry activities". **Statements such as this should not be made without supporting evidence.***

Much of the report is based on the author's opinion. There is little evidence provided to support many of the claims made. Statements should only be made if they can be substantiated by actual evidence."

While these staff showed the necessary scientific skills needed by the EPA, it seems more senior staff ignored and continue to ignore their findings.

Eighteen months after the public meeting, the EPA Director Forestry released a copy of the original, flawed uncorrected report to FCNSW and the NSW Shellfish Committee. This report was released despite the content undermining EPA endorsed soil science and erosion control methodologies.

In part the letter stated, *"The Office of Environment and Heritage (OEH) Science Division provided a report to the EPA titled "Sources of suspended sediment in the Wonboyn River catchment." It identified soil types and point sources of sediment types found to be suspended in water flowing through the Wonboyn River catchment. I've attached a copy of this report.*

The EPA will further discuss the report's findings with the Forestry Corporation of NSW to promote an improved understanding of the soil risks in the catchment and consider any implications for the regulation of forestry practices and land management more generally.

Despite multiple approaches to EPA senior staff and the NSW Ombudsman, the EPA continues to defend the release of the report and ignore the concerns raised that behaviour of some staff is potentially in breach of Section 7 of the GSE Act 2013 and the EPA Code of Ethics and Conduct 2015.

The most decisive action taken by the EPA in relation to this and other issues occurred in May 2020, as a result of two SETA Facebook posts detailing the EPA failure to *respond in a timely manner to requests, queries and incidents, communicating clearly and respectfully with meaningful content*

On 18 May 2020 SETA received a letter from the EPA Legal Services advising *"The EPA considers that the Posts may be defamatory to those named EPA employees.*

If SETA continues to publish similar posts, the EPA reserves the right to take action without further reference to you, including the commencement of legal proceedings."

After providing the EPA Director Litigation with a copy of a 14 page presentation made to a former EPA CEO on 28 September 2018, the EPA Director Litigation took a much more conciliatory approach. However, after yet another engagement process with senior EPA



staff, six months later, there is a firm focus on justifying actions taken and a steadfast refusal to commit to addressing staff behavioural issues.

Are these the types of behaviours that make a world class regulator and demonstrate adherence to Section 7 of the *GSEA 2013* and the *EPA Code of Ethics and Conduct* and other relevant government processes?

4. Responsive and Adaptive

The current EPA Chief Executive Tracy Mackey said the strategy explains “what you can expect from the (sic) us, why we regulate, how we do it and who we work with.”

"The strategy outlines the seven elements of the EPA's regulatory approach which includes to listen, influence, enable, monitor, enforce, act and require, as well as the EPA's objectives and commitments."

In 2013, the EPA, without consultation with all affected stakeholders, unilaterally changed the interpretation of what constituted a cliff under the licences applying to public land native forest harvest operation. The licence definition stated: *"Cliff means a rocky slope greater than 70 degrees steep and greater than three metres in height."*

The EPA argued that a "cliff" could include any isolated boulder with at least one face greater than 70 degrees and more than 3 metres tall. Any person with a basic understanding of what a rocky slope is, would know that the EPA interpretation was fanciful.

In court proceedings taken against FCNSW on 24 August 2017, *"In relation to the three elements, the EPA submits that it is an agreed fact that the relevant feature is a "rock feature", and therefore the feature is agreed to be "rocky". Further, the EPA submits that the Agreed Facts also indicate those parts of the rock feature that have a slope of 70 degrees or greater, and a height of greater than three metres. The EPA submits that there is no scope to import further parameters into the definition of a cliff, and accordingly the Court will be satisfied that the rock feature is a cliff for the purposes of the licence."*

The EPA in effect was arguing that there was no difference between a slope as a geographical feature and the slope of any object, as measured in degrees. The judge apparently could differentiate between the two forms of slope and ruled against the EPA's unilateral change of the definition. There was a significant waste of public funds, estimated to be in excess of \$100,000 and the apparent failure of the EPA to genuinely adhere to the Premiers Memorandum ***M1997-26 Litigation Involving Government Authorities.***

It was no surprise to those stakeholders subject to interrogation between the hearing and the judgement being handed down would like EPA forest enforcement officers *"to listen, influence, enable, monitor, enforce, act and require,"* rather than summons, dictate, waste time and demand answers to questions which the court has since shown to be unconscionable.

Is this the way a world-class regulator uses and tests the limits of its' regulatory and prosecution powers?

Recommendation 3

It is recommended that all current and future employees have a demonstrated knowledge of Section 7 of the *Government Sector Employment Act 2013*, the *EPA Code of Ethics and*



Conduct 2015 and the EPA Powers and Notices Guideline for Authorised Officers and Enforcement Officers January 2021.

5. Purpose and People Centred

"Our purpose informs everything we do."

"Our purpose is to provide public value by improving outcomes for the environment and human health.

We are responsible for regulating using a suite of legislation which establishes a strong basis for environmental regulation that is outcomes focused, proactive and contains appropriate compliance mechanisms.

We continually review the legislation we administer to ensure it is relevant, appropriate and consistent, providing both business and the community with greater certainty regarding its application."

While the purpose of the EPA seems reasonable, it should not be translated into an action agenda, where, in the cases noted above and in others not listed, it appears that the purpose is achieved through an "ends justifies the means" behaviour set.

For example, the EPA and other government agencies determined penalty regimes that would apply under Section 60N of the *Local Land Services Act 2013 (LLS Act 2013)* - 60N *Unauthorised clearing of native vegetation in regulated rural areas—offence*

Section 60N states in part: **Unauthorised clearing of native vegetation in regulated rural areas—offence**

Maximum penalty—

(a) for an offence that was committed intentionally and that caused or was likely to cause significant harm to the environment—

(i) in the case of a corporation—\$5 million, or

(ii) in the case of an individual—\$1 million, or

(b) for any other offence—

(i) in the case of a corporation—\$2 million, or

(ii) in the case of an individual—\$500,000.

The penalties in this section of the *LLS Act 2013* were supposed to align with the maximum penalties contained in other environmental legislation. This commitment from government was set out in a 4 September 2017 presentation on the proposed *Native Forestry Bill 2017*. The presentation stated in part:

"The NSW Governments vision for a sustainably managed forest estate that underpins a dynamic, economically efficient forest industry, which continues to support regional economies and delivers social and environmental benefits"

*"All **relevant powers and compliance mechanisms** brought across from both POEO Act and the BC Act."*



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SETA has great concerns that the EPA and other departmental staff members involved in negotiations were incapable of establishing a regulatory regime with penalties that align with **relevant provisions** of the *Protection of the Environment Operations Act 1997 (POEO Act 1997)*, or the *Biodiversity Conservation Act 2016 (BC Act 2016)*.

The maximum penalties of \$5 million applying under Sections 115, 116 and 117 of the POEO Act relate to disposal of waste (such as the ABC 4 Corners story on illegal waste dumping, which was subject to an ICAC investigation), leaks, spillages and other escapes and emission of ozone depleting substances. None of these breaches are applicable to actions that might affect native vegetation and biodiversity.

Section 13.1 of the *BC Act 2016* states the maximum penalty for a **Tier 1 offence is \$1,650,000 for a corporation and \$330,000 for individuals**, with additional penalties for continuing offences.

The maximum penalties applying to offences under the *BC Act 2016* (\$1.65 million) is the relevant penalty to be applied to offences under Part 5A section 60N of the *LLS Act 2013*, not \$5 million.

Does the quality of the advice for this penalty regime outcome fully meet the requirements of Section 7 of the *GSE Act 2013* and particularly the *Integrity* provisions?

Similar issues affect the penalty provisions applying under Part 5B Section 60ZZA of the *LLS Act*.

Section 60ZZA states in part:

A person who contravenes a requirement imposed by a **private native forestry plan or by an applicable private native forestry code of practice is guilty of an offence.**

Maximum penalty—

(a) for an offence that was committed intentionally and that caused or was likely to cause significant harm to the environment—

(i) in the case of a corporation—\$5 million, or

(ii) in the case of an individual—\$1 million,

Section 123 of the *POEO Act 1997* states that the maximum penalties for water pollution offences are **\$1 million for corporations and \$250,000 for individuals**, with additional penalties for continuing offences.

Water pollution is the relevant pollution risk associated with native forest harvesting operations. Under the *POEO Act 1997*, a land developer would be subject to a maximum fine of \$1 million for a serious water pollution offence. A native forest manager or contractor would be liable to a maximum fine of \$5 million for an identical offence under the *LLS Act*.

Is this a fair and equitable way to protect and advance healthy environments, economies and communities?

The maximum penalties in the *LLS Act 2013* are greatly in excess of the penalty provisions for comparable offences (water pollution and harm to biodiversity) in the *POEO Act 1997*, *BC Act 2016* and *Fisheries Management Act 1994 (FM Act 1994)*. The penalty regime does



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not differentiate between deliberate clearing of native vegetation without approvals and breaches of a harvest operation approval.

Section 220ZA of the *FM Act 1994* sets maximum penalties for harming threatened species or ecological communities at 2,000 penalty units or \$220,000.

Under Part 5A of the *LLS Act 2013*, Penalty Notice offences have been increased to \$15,000 for corporations and to \$5,000 for individuals. This means potential breaches under the approved plans will be treated with the same severity as operations conducted illegally. Given the example of the use of these punitive powers by some EPA enforcement staff, set out on page two of this submission staff values and penalty relativity issues must be addressed.

Penalty notice offences applying to Part 5A offences under the *LLS Act 2013*, are included in Schedule 1 of the *BC Act 2016* regulations. In relation to Clause 139 (Offence of contravening certain requirements of approvals or certificates), **maximum penalties for corporations are \$2,200 and \$440 for individuals, compared to \$15,000 and \$5,000 for offences under Part 5B of the *LLS Act 2016*.**

The provisions of the Bill which introduced these higher penalty levels under Part 5A into the *LLS Act 2013* was subject to an inquiry by the Standing Committee on State Development (SCSD). Their report was published on 5 June 2018. A number of witnesses gave evidence to the inquiry on the matter of increased penalties, including the EPA Director Forestry.

The response of the EPA Director Forestry to the issue of proposed increases in penalties set out in the Forestry Legislation Amendment Bill 2018 (which included the addition of Part 5B to the *LLS Act 2013*), detailed by three non-government witnesses, was noted page 7 of the SCSD report.

"In response to the concerns about penalties, Mr Hood from the NSW EPA advised that the bill 'brings penalty amounts already available into line with those already available for private forestry and other regulated industries in New South Wales'. He further informed the committee that there were actually no changes to the current penalty system:

It remains the same as it does now. The penalties were changed as all penalties were changed across the land management and biodiversity framework back in August of last year with the commencement of that piece of legislation. The penalties will roll over under this new bill. There is no change from now going forward.

Both the SCSD and the EPA Director Forestry failed to address the inequities in the environmental penalty regimes raised by affected stakeholders during the SCSD inquiry.

There is a clear intent to establish the harshest penalty regimes, whether operations are conducted with or without approvals. Those responsible for revising the *LLS Act 2013* private forestry penalty regimes have:

- Relied on comparison to irrelevant sections of the POEO Act to justify the maximum penalties for court-imposed penalties;



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- Chosen to impose the same penalty for breaches of approved plan conditions (usually at the low end of the environmental impact scale) for penalty notice offences, as would be applied to illegally conducted operations; and
- The size of the fines would not be an issue for the SETA membership, many of whom fall under the new provisions of the LLS Act, if they were confident that the regulating authority could deliver regulatory oversight in a fair and equitable manner.

SETA members and other stakeholders directly affected by these penalty regimes have ongoing concerns about the role played by EPA staff in negotiations for increased legislative penalties and the terms and conditions of the Coastal IFOA. The legislated penalty regimes affecting forest operations on private and public land more in common with activist NGO policy, than those of an outcome focussed world-class regulator.

Similar concerns apply to the conditions contained in the IFOA Conditions and Protocols.

Recommendation 4

If the EPA has a genuine desire to become a world-class regulator, it is recommended that the EPA implement a cultural change program to ensure staff values have a strong alignment with the Core Values set out in the *GSE Act 2013* and the *EPA Code of Ethics and Conduct 2015*.

Recommendation 5

As a first step to rebuilding constructive working relationships with forest industry individuals and businesses, the EPA work with other government agencies to reduce current penalties in the *LLS Act 2013* to align with those currently applying for similar offences in other relevant acts, including the *POEO Act 1997*, the *BC Act 2016* and the *FM Act 1994*.

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